Tomu Development v. Carlstadt 2006

24 pages

. Building remedy case example

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SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: BERGEN COUNTY
DOCKET NO. BER-L-5894-03

TOMU DEVELOPMENT CO., INC.,

Plaintiff,

v.

BOROUGH OF CARLSTADT,
PLANNING BOARD OF CARLSTADT,
and the NEW JERSEY
MEADOWLANDS COMMISSION

Defendants,

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: BERGEN COUNTY
DOCKET NO. BER-L-5895-03

TOMU DEVELOPMENT CO., INC.,

Plaintiff,

v.

BOROUGH OF EAST RUTHERFORD,
PLANNING BOARD OF EAST
RUTHERFORD, and the NEW JERSEY
MEADOWLANDS COMMISSION

Defendants,

Decided: May 19, 2006

Robert A. Kasuba and Thomas Jay Hall (Sills Cummis Epstein & Gross, P.C., attorneys) argued the cause for plaintiff.

Richard J. Allen, Jr. (Kipp & Allen, LLP, attorneys) argued the cause for defendant Borough of Carlstadt and Planning Board of Carlstadt.

Beverly M. Wurth (Calo Agostino, A Professional Corporation, attorneys) argued the cause for defendant Borough of East Rutherford and Planning Board of East Rutherford.

Robert L. Gambell and Christine Piatek (Zulima V. Farber, Attorney General, attorney) argued the cause for defendant New Jersey Meadowlands Commission.

JONATHAN N. HARRIS, J.S.C.

PREFACE

More than six months have elapsed since I unequivocally declared that Carlstadt and East Rutherford had neglected their constitutional obligations under the *Mount Laurel*[1] doctrine and their statutory duties under the Fair Housing Act. No responsible local official is unaware of the responsibilities that these principles have imposed. Yet, ignoring my order to comply fully by February 28, 2006 (110 days from the November 10, 2005 opinion), the defendant municipalities have again disappointed the citizens of the State of New Jersey. I start my analysis of the situation with the following thoughts in mind:

> If not you, who? If not now, when?
>
> (Paraphrased from the Talmud)

> Given the importance of the societal interest in the Mount Laurel obligation and the potential for inordinate delay in satisfying it, presumptive validity of an ordinance attaches but once in the face of a Mount Laurel challenge. Equal treatment requires at the very least that government be as fair to the poor as it is to the rich in the provision of housing opportunities. That is the basic justification for Mount Laurel. When that clear obligation is breached, and instructions given for its satisfaction, it is the municipality, and not the plaintiffs, that must prove every element of compliance. *It is not fair to require a poor man to prove you were wrong the second time you slam the door in his face.*
>
> *Mount Laurel*, supra, 92 N.J. at 190-191. (Emphasis added.)

[1] So. Burlington Cty. N.A.A.C.P. v. Mt. Laurel Tp., 92 N.J. 158 (1983).

INTRODUCTION

This is the compliance portion of a *Mount Laurel* II builder's remedy action that now requires the defendant municipalities to comply tangibly with their constitutional obligations regarding affordable housing. On November 10, 2005, in a written opinion, I declared that Carlstadt and East Rutherford had engaged in conduct unbecoming local government in New Jersey. In addition to awarding plaintiff a builder's remedy, I gave the municipal defendants one last chance each to legislate frameworks that would constitute compliance with their obligations to ensure reasonable opportunities for the actual construction of low and moderate income housing within their borders. Notwithstanding being painfully aware that such tasks would be complicated in light of the mutual exclusivity of zoning authority attributable to the New Jersey Meadowlands Commission's control of vast lands in East Rutherford and Carlstadt, they have incompletely performed. Accordingly, I must reluctantly employ drastic steps to fulfill the judiciary's duty to vouchsafe fidelity to constitutional norms. *Mount Laurel* II commands such actions in the face of such longstanding and blatant disregard for the unhoused and underhoused poor.

II. FACTUAL BACKGROUND

The factual background of this case is documented in the prior opinion dated November 10, 2005, and familiarity with that opinion

is assumed. Following the builder's remedy phase of the case, I ordered the following:

> East Rutherford's and Carlstadt's land use regulations remain invalid and unconstitutional insofar as they continue past exclusionary practices. The East Rutherford and Carlstadt Planning Boards and the respective governing bodies shall immediately prepare comprehensive compliance plans (including appropriate strategies to address the indigenous and unmet needs) for each municipality, together with zoning and planning legislation to satisfy the fair share obligations of rounds one and two, and the unmet need, all in compliance with COAH regulations. They shall draft meaningful Housing Element and Fair Share Plans, together with fee ordinances (if appropriate) and spending plans that are consonant with COAH rules. They shall exercise planning discretion in deciding whether to employ a program of rehabilitation grants, regional contribution agreements, accessory apartments, mobile homes, overlay zones, or any other incentive devices to meet the fair share and unmet need. This plan shall be completed, adopted, and presented to the court no later than February 28, 2006. In default thereof, *all* development regulations in East Rutherford and Carlstadt shall be permanently invalidated and a scarce resource order enjoining *all* land use development applications in East Rutherford and Carlstadt (whether before the Planning Board or Board of Adjustment or the NJMC) shall become automatically effective. On the other hand, if the municipalities, or either of them, comply, they will be entitled to a six-year judgment of repose commencing no earlier than February 28, 2006.

For its first and second round obligations as derived by the Council on Affordable Housing (COAH) under the Fair Housing Act, N.J.S.A. 52:27D-301 et. seq. (FHA), East Rutherford was obligated to provide 70 units of new construction and 34 units of rehabilitated housing. Since the builder's remedy provided for 60 affordable units on the Tomu site, East Rutherford did not have far

to stretch to find the additional ten units to fulfill its complement of new construction. Carlstadt, on the other hand, had a COAH-generated obligation of 186 units of new construction and 12 units of rehabilitated housing. The builder's remedy provided 80 affordable units in Carlstadt, thereby producing an unmet need for new construction of 106 units.

In order to meet the mandate of this court's order to rezone, both municipalities engaged in legislative activities. East Rutherford proposes three zoning changes. The first, implementing a mandatory 20% set aside for affordable units, will apply in its Neighborhood Commercial District. The second, an overlay zone providing for the redevelopment of industrial properties, will affect an 18-acre site known as the Star-Glo site and a separately owned 7.44-acre site. Third, a "Mixed Residential Overlay Zone," will affect a 4.79-acre site known as the Sequa site. The evidence presented regarding these zoning changes vis-à-vis site suitability and feasibility of development within the next six years was scanty and unpersuasive. Additionally, East Rutherford intends to implement a development fee ordinance. Conspicuously missing from East Rutherford's plan is any treatment of its rehabilitation obligation. Furthermore, East Rutherford eschews its COAH round three obligations, claiming that they are irrelevant to this proceeding.

In addition to adopting its own development fee ordinance, Carlstadt created two overlay zones in what it calls "upland Carlstadt" to fulfill its unmet need of new construction. One overlay zone affects Carlstadt's entire residential district and the other affects a light industrial area. In addition, Carlstadt claims that it has committed itself to redevelop municipally owned land (the former Washington School) to 100% affordable senior housing, but the details are conspicuously ambiguous. As with East Rutherford, Carlstadt has taken no meaningful steps to address its rehabilitation obligation and has ignored its round three obligations.

III. DETERMINATIONS OF LAW

At this stage of proceedings, the municipalities bear a tremendous burden of persuasion. Not only have they lost the builder's remedy portion of the litigation, but also their land use regulations have been found constitutionally wanting. This latter deficiency is required to be fixed as part of a unitary piece of litigation. Although the Special Master finds some salvation in East Rutherford's compliance effort, I cannot agree with him. With regard to Carlstadt, its thinly veiled half-baked offering was rightly rejected by the Special Master, a conclusion that is well supported by the record.

When a municipality has been found to have failed in its constitutional mandate to provide realistic opportunities for low

and moderate income housing within its borders, the court, as here, gives it one last chance. With that last-chance opportunity, the municipality must hew to applicable COAH regulations. At the very least, a municipality must conform its conduct to meet its new construction obligation, its rehabilitation obligation, and if a vacant land adjustment is granted (as here with Carlstadt), its unmet need. The easiest determination to make in this case relates to the utter failure and continued deafening silence of both municipalities to provide resources for their indigenous rehabilitation obligations. This is peculiarly significant because providing housing opportunities for rehabilitation purposes affects homegrown local citizens, not newcomers. Such efforts, usually to be applicable on a micro-local scale, are noteworthy for improving neighborhoods and individual qualities of life. Rehabilitation efforts do not implicate the more-feared large scale intrusions of mixed use or multifamily developments containing both market rate and affordable housing units. Although each defendant professes false piety that it is willing to participate in a recognized rehabilitation program administered by a county agency, no affirmative steps toward that end appear to have been seriously contemplated, much less planned for. This, again, is especially egregious because the rehabilitation obligation relates to existing residences and will most likely affect existing residents. The failure to address proactively a rehabilitation program for each

municipality's indigenous need leaves their current low and moderate income populace at grave risk to all of the ills associated with substandard housing.

Under past and present COAH rules, the municipalities were required, by the compliance due date of February 28, 2006, at least to designate an administrator to administer a rehabilitation program, submit a marketing plan, provide a framework of affordability controls for between six and ten years, fund up to $10,000 per unit of rehabilitation, submit a rehabilitation manual, and agree to submit to COAH monitoring. See N.J.A.C. 5:93-5.2; N.J.A.C. 5:94-4.3. It is no answer to their default that the municipalities plan to do all of this in the future. Their obligation was to comply before this litigation even commenced, and in the face of that initial failure, to comply by the date ordered in my November 10, 2005 written opinion.

Much more provocative is the failure of East Rutherford and Carlstadt to comply adequately with their recalculated new construction obligations and unmet need. East Rutherford must identify the reasonable likelihood that at least ten affordable units can be distilled from its revamped zoning regulations. In order to do this, it must designate sites and prove that they meet the criteria of N.J.A.C. 5:93-5.3(b)(availability, suitability, developability, and approvability). Instead of that painstaking proof, East Rutherford merely casts a blanket of a 20% set-aside

upon a land mass without demonstrating the likely yield of affordable units therefrom. Anecdotal information about the plans of developers and ongoing, incomplete applications is no substitute for the firm evidence required by COAH regulations. In addition, East Rutherford's planning efforts to encourage redevelopment for affordable residential use in an industrial district ignores whether any of the hoped-for sites are qualified to be counted under N.J.A.C. 5:93-5.3(b) as likely candidates for actual construction of affordable housing.

Carlstadt's efforts toward compliance stand on a different footing than East Rutherford's because it received a vacant land adjustment, and the Tomu builder's remedy will fulfill its new construction obligation. However, under N.J.A.C. 5:93-4.1, the difference between the initial new construction obligation and the recomputed (after a vacant land adjustment) obligation must be the subject of planning initiatives to ensure that if developable land becomes available in the future, there will be a firm mechanism in place to capture affordable housing opportunities on that land. Thus, the municipality must plan for this unmet need by legislative devices such as a redevelopment ordinance, a development fee ordinance, or an apartments-in-a-developed-area ordinance. N.J.A.C. 5:93-4.1(b). None of these strategies was used. Instead, Carlstadt uses a simplistic overlay zone technique that does not reveal the likely yield of units as to any potential properties in the future.

In addition, however, Carlstadt trumpets its plan to convert a former school into an affordable housing facility for seniors. None of the details of the proposal complies with N.J.A.C. 5:93-5.5, leaving the court and poor seniors in the dark as to the nature, scope, and timetable of the not-even embryonic development.

The missing link in all of the municipalities' compliance efforts has been the land in the jurisdiction of the New Jersey Meadowlands Commission. Contrary to plaintiff's view that East Rutherford and Carlstadt are required to lobby *affirmatively* for housing within their borders but beyond their control, I think that the municipalities should not be required to advocate purposefully positions that their elected officials deem contrary to the local public interest. This is especially so if it turns out that the New Jersey Meadowlands Commission is itself someday authoritatively obligated to ensure compliance with the *Mount Laurel* doctrine. However, recalcitrant municipalities, such as the defendants here, should not be allowed to inflict damage to affordable housing opportunities by either their active discouragement of such housing opportunities or by silence. As I will outline later, as part of the remedies section of this opinion, a Mount Laurel Implementation Monitor shall be appointed to speak on behalf of each municipality on matters affecting affordable housing in the New Jersey Meadowlands District in order to ensure that the inertia engendered by each municipality will no longer impede appropriate affordable

housing opportunities on lands in these municipalities under the control of the New Jersey Meadowlands Commission.

Among the remedies available to the judiciary if a municipality fails or refuses to comply with a court-ordered *Mount Laurel* rezoning effort is to enjoin all further development within the municipal borders. Another is to suspend all legislative barriers that prohibit multi-family uses while at the same time ensuring that any such development includes affordable housing. It is no answer that the court should give East Rutherford and Carlstadt one more chance to comply; that they misunderstood the court's direction; and now they will get it right. The reason for the absence of this last bite of the apple remedy is two-fold. First, the Supreme Court in *Mount Laurel* II would not countenance such a transparent delay tactic. Second, any further lag would only increase the detriment to plaintiff and the third party beneficiaries of plaintiff's builder's remedy by delaying the entry of a final, appealable judgment, again putting off into the future the ultimate disposition of this litigation. I must act *now* to end this litigation in a way that protects and preserves the interests of all concerned. One remedy that I have considered and rejected is the use of contempt proceedings against individual governmental actors or the municipal corporations themselves. Although monetary sanctions might well incite the defendant municipalities into action, and I truly understand the power of the wallet, I intend to

avoid the replication of local government errors that were committed in the past. Another reason I have eschewed the traditional contempt mode of ensuring compliance is to avoid the martyrdom syndrome that some public officials exploit. Rather than involve those governmental actors who have failed the public in the past, I have elected to simply remove them from the process and substitute a court-appointed monitor to oversee land development activities in East Rutherford and Carlstadt for the foreseeable future.

Here is my plan, to be effective on June 1, 2006, and continuing until further order of the court:

1. There are hereby created, as independent judicial officers, a Mount Laurel Implementation Monitor for the Borough of East Rutherford and a Mount Laurel Implementation Monitor for the Borough of Carlstadt (collectively called Monitor). All reasonable fees, costs, and expenses of the Monitor shall be borne by the Boroughs of East Rutherford and Carlstadt in proportion to the work done on behalf of each municipality by the Monitor. The Monitor shall have no role in local government affairs except as provided in this judgment. Excluding matters within the sole jurisdiction of the New Jersey Meadowlands Commission, no zoning permit, building permit, or any other authorization to use or develop land or structures within the Borough of East

Rutherford or the Borough of Carlstadt shall be valid until and unless it is reviewed and approved by the Monitor who shall have the following additional powers:

a. The Monitor shall have unfettered access to all documents and information the Monitor determines are necessary to assist it in the execution of its duties. The Monitor shall have the authority to meet with, and require reports on any relevant subject from any officer, agent, or employee of the Boroughs of East Rutherford and Carlstadt. The Monitor shall receive advance notice of, and have the option to attend, scheduled meetings of the governing bodies, planning boards, and boards of adjustment.

b. After giving due regard to the current (but now suspended) land use development legislation heretofore enacted by the municipalities, the Monitor shall forthwith adopt all necessary rules and regulations (including, if appropriate, interim or temporary rules and regulations) -- in lieu of zoning, land use, and development ordinances -- that will immediately provide reasonable opportunities for the creation of low and moderate income housing in accordance with the FHA and the rules and regulations of COAH. Each municipality shall immediately adopt by ordinance the Monitor's rules and regulations as the municipality's respective land use legislation. If a municipality fails or refuses to adopt the Monitor's rules and regulations as its respective land use legislation, said rules and regulations shall nevertheless substitute for and act as the land use laws of the respective municipality, to

be enforced as such by the Monitor and the municipality's agents, officers, and employees.

c. The Monitor shall oversee and review all applications for development, requests for land use or building permits, requests for interpretations, and appeals that would otherwise be within the jurisdiction of the boards of adjustment, planning boards, or administrative officials' jurisdiction under the Municipal Land Use Law. In order to validate any application for development, request for land use or building permit, request for interpretation, or appeal, the approval of the Monitor shall be required. The Monitor shall have the authority to disapprove, reverse, or reject any application for development, application for a land use or building permit, request for an interpretation, or appeal if it would frustrate, impede, or counteract the creation of low and moderate income housing in the municipality. Similarly, the Monitor shall have the authority to overrule and reverse the denial of an application for development, request for a land use or building permit, request for an interpretation, or appeal if, in the exercise of the Monitor's discretion and judgment, such application for development, request for a land use or building permit, request for an interpretation, or appeal would foster the creation of low and moderate income housing opportunities.

d. The Monitor shall prepare a formal Housing Element and Fair Share Plan (Affordability Plan)for each municipality. The Affordability Plan shall comply with the FHA and all current rules and regulations of COAH, and shall include provisions to meet all obligations

relating to indigenous need, new construction, unmet need, and COAH's third round rules. The Monitor shall be permitted to utilize and implement any technique authorized by the FHA or COAH including but not limited to regional contribution agreements, accessory apartments, and mobile homes to achieve compliance. Each municipality shall be required to adopt the Affordability Plan of the Monitor and shall take all appropriate actions, including appropriating funds and executing all necessary documents, to implement the provisions of the Affordability Plan.

e. The Monitor shall act in the place and stead of the municipality or its designated agent (as provided by statute, regulation, or common practice) in connection with development applications, zoning and planning activities, or requests for permits that are within the jurisdiction of the New Jersey Meadowlands Commission. In this capacity, the Monitor shall advocate, either district-wide or on an application-by-application basis, for the creation of affordable housing opportunities within each municipality even if the New Jersey Meadowlands Commission has sole jurisdiction over the matter. The Boroughs of East Rutherford and Carlstadt, together with their agents, officers, and employees, are enjoined and barred from taking any action, whether orally or in writing, in connection with development applications, zoning and planning activities, or requests for permits that are within the jurisdiction of the New Jersey Meadowlands Commission unless such action is approved by the Monitor in writing in advance.

f. The Monitor shall apply to COAH, when the instant litigation is concluded, for substantive certification pursuant to then extant statutes, rules, and regulations.

g. The Monitor shall take such other actions, including but not necessarily limited to the hiring of experts, agents, and employees, that are reasonably necessary for conducting the activities of the Monitor. Additionally, the Monitor shall have authority to require the municipalities and their agents, officers, and employees to take any actions the Monitor believes are necessary for compliance with this judgment.

2. All zoning, land use, and development ordinances of the Borough of East Rutherford and the Borough of Carlstadt, including site plan and subdivision ordinances, are hereby suspended and rendered ineffectual relating to any and all future land use, construction, or development efforts in the municipalities. Such ordinances shall be treated as advisory only and shall serve as commentary to serve the Monitor. Until the Monitor adopts the rules and regulations as required by this judgment (whether interim, temporary, or permanent) 1)no development applications shall be reviewed by the municipalities' boards of adjustment or planning boards and 2)no building or other land use permits shall be issued by any officer, agent, or employee of the defendant municipalities, except those necessary to avoid imminent peril to life or property. Said ordinances,

however, shall continue in full force and effect for all uses and structures that currently exist (meaning that there is a valid certificate of occupancy or building permit in effect) in order to prevent the illegal use of land and structures. Uses and structures that have been approved by a local construction official, zoning officer, board of adjustment, or planning board but have not yet commenced operation or begun construction are prohibited from commencing operation or beginning construction until reviewed and approved by the Monitor for compliance with this judgment.

3. The terms and conditions of the Order Imposing Scarce Resource Restraints dated May 13, 2005 (annexed to this opinion) are continued until further order of the court.
4. Robert T. Regan, Esq. is appointed the Monitor. If the Monitor resigns or is unable to serve, a successor shall be appointed by the court within thirty days. The Monitor shall serve until further order of the court or until final substantive certification is obtained from COAH, whichever is sooner.
5. All elected officials of the Boroughs of East Rutherford and Carlstadt shall be required to certify in writing, and submit their certifications to the Monitor no later than December 31, 2006, that they have read the Preface (pp. xi

to xiv), Prologue (pp. 3 to 11), and Chapter XI (pp. 175 to 185) of Suburbs Under Siege by Charles M. Haar (Princeton University Press 1996).[2]

6. The municipalities are not entitled to a judgment of repose because they have not met their constitutional obligations and have not complied with the FHA, including the COAH third round obligations. In lieu of a judicial judgment of repose, I contemplate that upon conclusion of this case, the municipalities will obtain substantive certification through COAH's procedures.

IV. CONCLUSION

I request that Mr. Regan prepare the appropriate final judgment to memorialize this decision and submit it to opposing counsel and to the court as soon as possible pursuant to R. 4:42-1(c).

[2] Available at the Ridgewood Public Library, Ridgewood, New Jersey under call number 344.73 HAA. See http://www2.bccls.org/ (last visited on May 19, 2006) and http://www.ridgewoodlibrary.org/ (last visited on May 19, 2006).

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FILED

MAY 13 2005

JONATHAN N. HARRIS
J.S.C.

TOMU DEVELOPMENT CO., INC., Plaintiff, v. BOROUGH OF CARLSTADT, PLANNING BOARD OF CARLSTADT and NEW JERSEY MEADOWLANDS COMMISSION, Defendants.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION - BERGEN COUNTY DOCKET NO: BER-L-5894-03 Civil Action
TOMU DEVELOPMENT CO., INC., Plaintiff, v. BOROUGH OF EAST RUTHERFORD, PLANNING BOARD OF EAST RUTHERFORD and NEW JERSEY MEADOWLANDS COMMISSION, Defendants.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION - BERGEN COUNTY DOCKET NO. BER-L-5895-03 Civil Action **ORDER IMPOSING SCARE RESOURCE RESTRAINTS**

This matter has been brought to the Court upon the application of Plaintiff, Tomu Development Co., Inc. ("Tomu") for a scarce resource order in the above-captioned litigation, and the Court having heard oral argument on February 18, 2005 and requested the court-appointed Master to issue a report on this motion. The court-appointed Master has reviewed the parties' submissions and approved of the issuance of a scarce resource order as set forth in his report dated April 13, 2005, and the Court having considered the submissions of the parties regarding the master's report finds that good cause exists for this Order to be entered,

IT IS on this 13 day of May, 2005, ORDERED as follows:

#880922 v4

1. The Borough of Carlstadt's motion objecting to the report of the Special Master dated April 13, 2005 is DENIED.

2. The New Jersey Meadowlands Commission's objections to the report of the Special Master dated April 13, 2005 is DENIED in part and GRANTED in part, as set forth below.

3. The report dated April 13, 2005 of Mr. Regan, the court-appointed Master, is APPROVED except as MODIFIED below.

4. Land, public potable water supply and sewerage capacity are hereby declared to be a scarce resource within the Borough of East Rutherford ("East Rutherford") and the Borough of Carlstadt ("Carlstadt"), including the portions of both municipalities that are under the jurisdiction of the New Jersey Meadowlands Commission ("NJMC").

5. a. Subject to Paragraph 9 of this Order, public sewerage is hereby declared a scarce resource in Carlstadt and East Rutherford (collectively, "Municipal Defendants"). Any and all public sewer capacity in Carlstadt and East Rutherford, other than gallonage currently allocated to serve existing uses, is hereby placed under the control of the Court. No new sanitary sewer connections can be granted for any development and/or redevelopment project in Carlstadt and/or East Rutherford, including those portions of both municipalities that are located within the jurisdiction of New Jersey Meadowlands Commission ("NJMC"), without the prior approval of the Court.

b. Notwithstanding the provisions of Paragraph 5.a above, any new sanitary sewer connection, which is estimated to generate less than 1,500 gpd of wastewater, shall be automatically exempted from the restraints on the further depletion of the sewerage system as set

forth in this Order and shall not be required to apply for relief from this Order under the provisions set forth in Paragraph 8.

6. a. Subject to Paragraph 9 of this Order, potable water is hereby declared a scarce resource in East Rutherford and Carlstadt. Any and all potable public water supply in East Rutherford and Carlstadt, other than that supply serving existing uses, is hereby placed under the control of the Court. No new connections to public water supply can be granted for any development and/or redevelopment project in East Rutherford and/or Carlstadt, including those portions of both municipalities that are located within the jurisdiction of the NJMC, without prior approval of the Court.

b. Notwithstanding the provisions of Paragraph 6.a above, any new connection to the public potable water supply, which is estimated to use less than 1,500 gpd of potable water, shall be automatically exempted from the restraints on further depletion of the public water supply as set forth in this Order and shall not be required to apply for relief from this Order under the provisions set forth in Paragraph 8.

7. a. Subject to Paragraph 9 of this Order, land whether currently vacant or redevelopable, is hereby declared a scarce resource in Carlstadt and East Rutherford, including those portions of both municipalities that are located within the jurisdiction of the NJMC. No application for development and/or redevelopment, including any application under the regulations of the NJMC (specifically N.J.A.C. 19:4-1.1 et seq. and 19:5-1.1 et seq.) of any parcel of land larger than 20,000 square feet may be approved by the NJMC or the Municipal Defendants, acting either through their Planning Boards or Zoning Boards of Adjustment, without prior approval of the Court. Prior court approval is not necessary for the approval of any application involving minor applications for existing uses related to already developed

properties, such as the addition of rooms or decks to existing housing, modifications of an existing commercial or industrial site for continuation of existing uses, or minor subdivisions of land which do not result in any new structures or uses. All other applications for development or redevelopment, not otherwise exempt under this Order, shall require the prior approval of the Court before any land use approvals may be granted by the Municipal Defendants' Planning Boards or Zoning Boards or the NJMC.

b. Notwithstanding the provisions of Paragraph 7.a above, an application for final site plan or subdivision approval shall be automatically exempted from the restraints on the development and redevelopment of land as set forth in this Order and shall not be required to apply for relief from this Order under the provisions set forth in Paragraph 8 provided that the application for final site plan or subdivision approval only seeks to ensure that the ordinance standards for final approval have been complied with and the conditions of the preliminary approval have been complied with subject to minimal deviations as set forth in N.J.S.A. 40:55D-50.a.

8. Applications for relief from any of the aforementioned scarce resource restraints shall be made as follows:

a. A full and complete description of the resource being sought to be released, along with the justification for the release of such resource shall be provided to the court-appointed Master and all parties to this litigation. An inclusionary or contributory affordable housing development, such as that sought by Tomu would be appropriate for such release.

b. The court-appointed Master may request such additional information as necessary in order to fully understand the nature of the relief requested and the impact such

request would have on the production of affordable housing within Carlstadt and East Rutherford.

c. Within thirty days following receipt of all necessary information, the court-appointed Master shall supply to the Court, all parties in the litigation and anyone requesting such relief a copy of a report and recommendation, setting forth, in detail, the Master's position with respect to any release of any said resource.

d. The entity seeking release of such restraints shall thereafter file a motion on notice of all parties in this litigation for said relief with the Court, which has jurisdiction to allocate or withhold the requested relief. Notwithstanding the foregoing, if the Master recommends that the resource be released and no party in the litigation filed an objection with the Master, a formal motion shall not be required, and the entity seeking such restraints shall submit an Order to the Court and to all parties in this litigation under the five-day rule.

e. All costs for such requested relief, production of the Master's report, and court costs shall be borne by the entity seeking to obtain such relief. No such relief can be granted if in the determination of the Court, granting the relief will impede the construction of the Municipal Defendants' fair share of affordable housing units.

9. a. Any development and/or redevelopment project located within the jurisdiction of the New Jersey Sports and Exposition Authority shall be exempt from this Order and is not required to apply for relief from this Order under the procedures set forth in paragraph 8.

b. Any development and/or redevelopment project located on Block 104, Lots 1, 1.01, 1.02, 2 and 3 in the Borough of East Rutherford shall be exempt from this Order

and is not required to apply for relief from this Order under the procedures set forth under the procedures set forth in paragraph 8.

10. A copy of this Order shall be served upon all counsel of record within seven (7) days of the date hereof.

HON. JONATHAN N. HARRIS, J.S.C.

Jonathan N. Harris, J.S.C.